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The Top Three Copyright Cases of 2012

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In my last entry in this series, I examined three important patent law cases from 2012 – one at the Supreme Court level, one at the appellate level, and one at the trial court level. I'll now do the same thing with regard to copyright cases.

My Supreme Court choice is *Golan v. Holder*, in which the Court upheld a statute that restored U.S. copyright protection to certain foreign works, thus removing them from the public domain. Such works had lost their protection – or had never acquired it in the first place – because of their failure to comply with formalities like registration and notice, or for reasons having to do with U.S. restrictions on the protection of certain foreign works. Having removed those formalities and restrictions from U.S. law, Congress sought to remove their consequences as well, by restoring the copyrights the works otherwise would have enjoyed. In *Golan*, the Supreme Court held that neither the Patent and Copyright Clause nor the First Amendment prohibited Congress from doing so.

This decision essentially sounds the death knell for any constitutional limitations on Congress's power to shape copyright law. Such limitations had already been on life support since *Eldred v. Ashcroft*, a 2003 decision in which the Supreme Court upheld a 20-year extension of copyright duration even for works already in existence – *i.e.*, works whose authors had apparently been sufficiently motivated by the shorter term. But at least the works in *Eldred* had not yet passed into the public domain. In *Golan*, however, the Court ruled that even works that were once in the public domain can be copyrighted anew. The public domain is now officially a vacuum, an absence of rights, rather than an affirmative source of benefits for the larger public.

At the appellate level, the most significant copyright case was the Eighth Circuit's decision in *Capitol Records Inc. v. Thomas-Rasset*. Plaintiffs from the recording industry had successfully sued the defendant for file-sharing, and the issue on appeal was the constitutionality of a jury award of $222,000 for the infringement of 24 songs – $9,250 per song. Such an amount was permissible under the Copyright Act's statutory damages provision. Indeed, Congress has authorized statutory damages up to $150,000 per work, so the defendant's exposure was actually $3.6 million!

In other contexts, however, courts have held that it is a violation of due process to impose a damages award "so severe and oppressive as to be wholly disproportioned to the offense." Given that the songs at issue were available on iTunes for a dollar each, an award of $9,250 per song was arguably disproportionate. Not according to the Eighth Circuit, however; citing the need for deterrence and the difficulty (in some cases) of proving actual damages for copyright infringement, the court upheld the award. Now the defendant has petitioned the Supreme Court to review that holding, and there is a non-negligible chance that the Court will take her up on the invitation.

My choice among trial court cases is *Cambridge University Press v. Becker*, from the Northern District of Georgia. This one is a real doozy, a 350-page ruling following a bench trial. The plaintiffs were publishers of educational materials, who accused Georgia State University of systematically copying and distributing their works through an electronic reserves system. Of

particular significance was that the system instructed individual instructors to make a fair-use determination on a case-by-case basis. It is difficult to summarize such a long opinion, but the case was clearly a huge win for the university. The court found that 95 percent of the e-reserves it considered were fair uses or were otherwise legal. It also rejected reliance on the Guidelines for Classroom Copying, which previous courts had cited, and instead gave its blessing to the more flexible Fair Use Checklist. Perhaps most significant was its holding that copying a single chapter of a book (or less than 10 percent of the total length) is usually fair use – a rare example of a bright-line rule in what is usually a morass of intricate, context-specific, multifactor standards.

And what's the copyright Case To Watch in 2013? None other than *Kirtsaeng v. John Wiley & Sons*, in which the Supreme Court will decide whether copyrighted goods manufactured abroad may be resold in the United States without having to get a new license from the copyright owner. This seemingly arcane issue actually has big implications, as I have explained here and here. The Court has already heard oral argument in the case, so look for a decision soon.